



# ACCC enforcement guidance— free range hen egg claims

October 2015



Consumers and free range egg producers are entitled to trust that free range eggs claims are matched by practices where hens actually spend time outdoors.

# A guide for egg producers

The ACCC has produced this guide to help hen egg producers of all sizes understand their fair trading rights and obligations when promoting or selling free range eggs. The guide will also inform consumers and the public more generally about the ACCC's approach to free range egg claims, which may assist the public to have confidence buying free range.

## How consumer laws apply to free range eggs

The *Australian Consumer Law (ACL)* places an obligation on traders not to mislead consumers in promoting their goods and services. Consumers should be able to trust the statements about the products they choose to buy. To not mislead consumers, any claims that eggs are free range means they must come from hens that a reasonable consumer would consider are free range.

These requirements are not new. The ACL has been in effect since 2011 and prior to that there were similar provisions in the *Trade Practices Act 1974*. The ACL applies nationally to the promotion and sale of all goods and services, including eggs.

The ACL requires that any statement or representation you make when advertising or selling your eggs must not be misleading or deceptive, or likely to mislead or deceive. This includes claims that the eggs you advertise or sell are laid by free range hens.

In response to increasing public interest in free range egg claims and significant increase in demand for and supply of eggs labelled as **free range**, the ACCC has undertaken a number of investigations and taken court action against several suppliers it alleged were misleading consumers with their free range claims. Some investigations continue and a number of cases remain before the Court as we publish this guide.

We have produced this guide in response to various requests from industry to clarify the ACCC's approach to free range egg claims and to provide further certainty to business about their obligations and how to avoid possible enforcement action.

## About free range claims

You are making a free range claim if you are:

- using the words 'free range' on your packaging or in your advertising material
- using words that mean the same thing as free range on your packaging or in your advertising material
- using pictures of hens ranging freely including in a grassy field.

## Using free range labelling

Producers do not have to use the label 'free range'. Producers choose to describe their eggs as free range to promote their products and consumers are generally willing to pay a premium for free range eggs.

While some jurisdictions require certain labels to be used (for example in the ACT), it is open to producers to market their eggs under different labels, such as barn-laid or cage-free, where their practices do not meet consumer expectations for free range (as long as their eggs are actually barn-laid or cage-free).

An expectation that free range eggs involve hens that spend time outdoors on an open range is not controversial. It also accords with how many producers market their products with pictures of hens in open fields.

## Acceptable free range claims

In recent cases, the ACCC has submitted to the Court that use of the descriptor 'free range' requires, at least, that the hens are able to move about freely on an open range on most days, and that most of the hens do so. This is consistent with current case law.

It is clearly misleading to claim your eggs are free range when the hens that laid the eggs never left the barn.

### Use of the outdoor range

We understand laying hens may spend periods indoors, for example, to avoid hot or poor weather, when predators are present, when the hens are medicated etc. We expect producers to take the same common sense approach as we would and not expect to always see hens on the range or expect every hen to be outside every day.

But the ACCC rejects claims by some that it is ok to tell consumers that the eggs are from free range hens when the outdoor range is not regularly used by the hens because the farming practices are such that the hens stay indoors all or most of the time.

Your production practices are up to you. However, the prohibition on misleading or deceptive conduct in the ACL is relevant to how you promote your eggs. If it's not normal for most of the hens to leave the barn and to move about freely on an open range on most days, making a free range claim—through words or images—in relation to such eggs is likely to be misleading.

#### Example 1. Hens that never go outside

A producer sources eggs from hens that have never left the barn and sells those eggs in cartons labelled free range and uses images of free ranging hens.

In the ACCC's view, such a claim is likely to mislead consumers and would be in breach of the ACL.

#### Example 2. Most hens don't range freely

A producer sources eggs from hens, most of which don't go outside the barn, sells those eggs as 'free range' and uses images of free ranging hens.

In the ACCC's view, such a claim is likely to mislead consumers and would be in breach of the ACL.

### ACCC assessments

The ACCC is not an industry expert—but we have relied on industry expertise to assist us with considering the types of practices more likely to lead to hens accessing an outdoor range.

The ACCC is an expert in considering consumer protection matters and the type of claims likely to mislead consumers. It is our role to address instances of misleading conduct where we consider there to be significant harm.

## Avoiding misleading free range claims and ACCC action

There will be many ways in which producers can design their farming infrastructure and practices that might lead to outcomes consistent with consumer expectations of free range claims. One risk of being too prescriptive is to prevent innovative and competitive approaches. But there are some things that producers can look at to gain comfort that they can legitimately label their eggs as free range and avoid ACCC action.

***The ACCC considers the fundamental test is to assess whether your farming practices involve most of your hens moving around freely on an open range on most days.***

We don't expect a precise approach of tracking hens or head counts to be sure. A common sense approach of observations that the range is in regular use by significant proportion of hens each day is likely to be sufficient to substantiate a free range claim.

We are advised the following factors are relevant to hens accessing the range.

**Indoors**—The general principle is that the flock size and indoor conditions, which include the nesting and rearing environment, physical architecture, and openings (either opensides or popholes) should be such as to allow each hen in a flock continuous and unrestricted access to an outdoor range, either through opensided barns or popholes, during daylight hours.

*Flock size*—The discrete flock size is a threshold issue. While stocking density, barn size and flock size are inextricably related, it is the flock size which largely determines the ability of each hen to access an outdoor range. This is because larger flock sizes must be kept in larger barns so this will not only increase the absolute number of unfamiliar hens the hen must navigate past but also increase the average distance the hen must travel to reach an open side or pophole.

*Internal architecture*—The size of the barns and the arrangements of the interior content significantly affect the propensity of the hens to exit the barns. Hens will find traveling relatively significant distances to the popholes to be a major disincentive and this is aggravated appreciably if there are a number of physical structures or impediments such as nesting boxes, conveyer belts, feeding mechanisms which obstruct their passage to the popholes or open sides.

*Openings*—The number of hens per metre of pophole is one of the most important factors affecting the propensity of hens to exit the barn. This said, the actual size of the popholes cannot be considered in isolation, as the locations of the popholes themselves, the distances the hens have to travel to reach the popholes, the physical obstacles and groups of other hens they have to navigate past, and the ease of accessing the popholes both when exiting and re-entering (i.e. the siting and height of ramps) all significantly influence the propensity of hens to exit the barns.

**Outdoors**—The outdoor dimensions and conditions are important but should be seen as less fundamental factors than the indoor conditions.

*Outdoor conditions*—It seems uncontroversial that the provision of adequate shelter which is available at all times makes that outdoor range appealing to hens.

*Outdoor densities*—The hens tend to engage in their natural behaviours in an area adjacent to, or certainly not too distant, from the barn so any consideration of stocking densities has to be based on the viable grazing area. The ACCC notes that current voluntary standards vary on the appropriate density. For example, while the RSPCA standard and the Model Code both provide a maximum of 1500 birds per hectare absent a rotational range management strategy, the RSPCA standard (but not the Model Code) sets an absolute maximum of 2500 birds per hectare if rotational range management strategies are in place.

## The harm of misleading free range claims

Producers, as much as consumers, have an interest in truth in advertising.

Producers who do the right thing and only make free range claims when their hens go outside, lose out when other producers make free range claims even when the eggs are from hens that have never been outside.

- Those producers—including smaller and innovative businesses (often with more costly systems) that do allow hens to roam freely on the range are suffering a competitive disadvantage.

Secondly, and quite plainly, consumers are misled into paying a premium for a product they believe has been produced in a certain way when it was not.

# Legislative developments

While there are currently various voluntary standards and guidelines that address the same or similar factors to those outlined above, we understand that some egg producers want more certainty about how to avoid contravening the law if they make a free range claim.

On the date this guidance is released the Australian Government is consulting upon a number of options for regulation of free range egg production including a set of farming practices that you can implement that are likely to ensure most birds go outside on most days. You can see more information on the [Treasury Department website](#) and the ACCC encourages you to contribute to this process.

The government may mandate a standard or provide a 'safe harbour' defence (i.e. legislative comfort that you will not breach the law making a free range claim if you follow certain farming practices) or a voluntary approach. When the consultation process has ended and a policy is set down by government, the ACCC will revisit this guidance.

## Next steps

You should carefully consider the claims you are making and the farming practices you employ. Where you make free range claims, you should assess whether your farming practices lead to most hens going outside on most days—not a scientific or precise measure—but use of common sense. Where not, we would expect you to review your packaging and advertising or look to adjustments you can make to bring about a reality of most birds going outside on most days.

Producers that are taking genuine steps to assess whether hens go outside and, if necessary can demonstrate real actions they are taking to encourage hens to range, will be much better placed if the ACCC undertakes enquiries.

If you consider that a producer, perhaps one of your competitors, is at risk of breaching the ACL in their free range claims, the ACCC can investigate alleged breaches of the ACL and where necessary, take legal action against businesses that break the law. The ACCC welcomes your inquiries and information on 1300 302 502 or online, <http://www.accc.gov.au/contact-us>.

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### Important notice

This guideline is designed to give you basic information; it does not cover the whole of the *Competition and Consumer Act 2010* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) or other relevant legislation and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible and there may be generalisations about the application of the above Acts, some of the provisions referred to have exceptions or important qualifications. In most cases, the particular circumstances of the conduct need to be taken into account when determining how these Acts apply to that conduct.

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